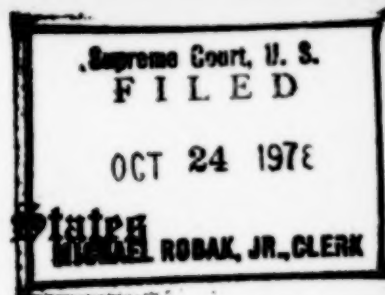


IN THE
Supreme Court of the United States
OCTOBER TERM 1977



No. 77-1337

UNIVERSITY OF NEVADA and the
STATE OF NEVADA,

Petitioners,

v.

JOHN MICHAEL HALL, Minor by and Through His
Guardian Ad Litem JOHN C. HALL and PATRICIA
HALL,

Respondents.

**REPLY BRIEF OF PETITIONER
ON WRIT OF CERTIORARI TO THE COURT OF
APPEAL OF CALIFORNIA, FIRST
APPELLATE DISTRICT DIVISION FOUR**

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REPLY BRIEF OF PETITIONER

ARGUMENT AND CITATIONS OF AUTHORITY

I. NEVADA DID NOT WAIVE IMMUNITY BY ANY STATEMENTS MADE
IN OPEN COURT

Respondents contend that Nevada, by appearing in the California trial courts through a Deputy Attorney General and specifically as a result of statements made by such Deputy Attorney General, has waived any immunity which may have existed. The statements of Deputy Attorney General Michael W. Dyer upon which respondent relies are set forth at page 10 of the

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reporter's transcript lines 15 through 18.
The statements are as follows:

"The whole issue is not whether Nevada is immune from suit. We admit that we are susceptible to suit in California. The question is whether full faith and credit must be given to our limitations."

Respondents would have the court view these statements in a vacuum and conclude therefrom that the statements constitute a waiver of any immunity to which Nevada might otherwise have been entitled.

In reality the statements of Deputy Attorney General Dyer were made in arguing a motion requesting the trial court to limit damages as required by Nevada's statutory waiver of sovereign immunity. The motion to limit damages was made only after the State of Nevada had unsuccessfully attempted to have service of process quashed and after a lengthy jurisdictional battle with respect to trial of the action which had extended to this very court and which is addressed in the statement of the case in the brief of petitioner, p. 7.

The statements of Deputy Attorney General Dyer were made in rebuttal to Respondent and must be read in the context of the argument on the motion to limit damages. In his opening argument, Deputy Attorney General Dyer stated:

"Clearly the State of Nevada has waived immunity. When we come to California we are subject to suit in California

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because and only because of our waiver of immunity." Reporter's transcript p. 7, lines 5-7.

The statements of Deputy Attorney General Dyer are thus entirely consistent with the position to which the State of Nevada has adhered from the time that this court denied certiorari in *Hall v. University of Nevada*, 8 Cal. 3d 522, 503 P.2d 1363, cert. denied 414 U.S. 820 (1973), and Nevada was faced with trial in the courts of the State of California. That position is that the only manner in which the California courts could conceivably have obtained jurisdiction over the State of Nevada was pursuant to Nevada's statutory waiver of immunity and that full faith and credit therefore required that the entire statutory scheme, including the limitation of damages portions thereof, be given effect.

It is literally inconceivable that statements made in arguing that Nevada was subject to California's jurisdiction only because of her statutory waiver of immunity and that courts of California were required to recognize and adhere to Nevada's statutory waiver of immunity could be interpreted as a waiver of any immunity to which Nevada was entitled. The statements of Deputy Attorney General Dyer were made in an attempt to require the court to acknowledge Nevada's immunity and the viability of the statutory limitation placed thereon. No logical construction of these statements could be interpreted in any other manner.

Even assuming arguendo that the

bounds of logic were stretched to such an extent that the statements of Deputy Attorney General Dyer could be construed as an attempt to waive any immunity to which Nevada was entitled, no waiver could result. Deputy Attorneys General of the State of Nevada are alter egos of the Nevada Attorney General and as such are possessed only of such powers as the Attorney General is possessed. NRS 228.080(1). The powers of the Nevada Attorney General are statutory in nature. Nevada Constitution, Article 5, section 22. The power to waive Nevada's sovereign immunity is not included among such specified statutory powers. Only the legislature of the State of Nevada is empowered to waive Nevada's immunity from suit. Nevada Constitution, Article 4, section 22.

The case of *Ford Motor Co. v. Department of Treasury of State of Indiana*, 323 U.S. 459 (1945) is directly on point. In *Ford Motor Co.*, the court addressed the question of whether the Attorney General of the State of Indiana could waive the state's immunity from suit. After viewing the statutory powers conferred upon the Indiana Attorney General and the provisions for waiver of the state's immunity, the court concluded:

"Since the state legislature may waive state immunity only by general law, it is not to be presumed in the absence of clear language to the contrary, that they conferred on administrative or executive officers discretionary power to grant

or withhold consent in individual cases. Nor do we think that any of the general or special powers conferred by statute on the Indiana Attorney General to appear and defend actions brought against the state or its officials can be deemed to confer on that officer power to consent to suit against the state in courts wherein the state has not consented to be sued."

The Attorney General of Nevada has no power to consent to suit on behalf of the State of Nevada, that power being specifically granted to the Nevada legislature. The Nevada legislature in enacting the Nevada statutory waiver of sovereign immunity and specifying the conditions and limitations thereon, did not empower the Nevada Attorney General to consent to suit other than as specified by the legislature. Thus, any conceivable attempt at waiver of the limitation on liability contained in the Nevada statutory waiver of sovereign immunity by a Nevada Attorney General or one of his deputies would be without any legal efficacy. *Ford Motor Co. v. Department of Treasury of State of Indiana*, *supra* at 352.

II. NEVADA IS NOT ATTEMPTING TO EXPAND HER JURISDICTION INTO SISTER STATES.

Respondents contend that Nevada is attempting to extend her jurisdiction into her sister state of California. This contention is apparently based

on respondents' assumption that since states of the Union may legislate and exercise direct jurisdiction over citizens only within their boundaries, recognition of a state's sovereign status is limited by her geographical boundaries. Thus, respondents assert that by acknowledging the sovereign status of sister states when such sister states were performing governmental functions outside their geographical boundaries, a state would consent to a sister state exercising legislative and police power jurisdiction outside her boundaries.

The fundamental flaw in respondents' theory is that Nevada is not arguing that she has the power to exert legislative or police power jurisdiction over citizens of sister states. Nevada's position is simply that the states of the Union are not free to treat each other as independent nations but rather are required to at all times acknowledge the sovereign status of sister states. That is to say, states of the Union must at all times acknowledge the sovereign status of sister states. Respondents concede at page 14 of the Reply Brief that "immunity is an attribute of sovereignty." States, in acknowledging the sovereign status of their sister states must therefore necessarily acknowledge their sister states' immunity from suit.

Since states are required to acknowledge the sovereign status of sister states and immunity is an attribute of such sovereign status, it necessarily follows that the only manner in which the California courts could conceivably have obtained jurisdiction over the State of Nevada is

through Nevada's statutory waiver of immunity. If in fact the Nevada statutory waiver may be read as allowing California courts to obtain jurisdiction, the California courts, being entirely dependent on the Nevada statutory waiver for jurisdiction, must give effect to the entire statutory scheme, including the limitation on liability contained therein. *Davis v. Mills*, 194 U.S. 451, 454 (1904); *Slater v. Mexican National R.R. Co.*, 194 U.S. 120, 126 (1904); *Pearson v. Northeast Airlines, Inc.*, 307 F. 2d 131 (2nd Cir. 1962), rehearing 309 F. 2d 553, cert. denied 372 U.S. 912.

CONCLUSION

The statements of Deputy Attorney General Dyer, in arguing a motion to limit damages in the trial court, were clearly not intended as a waiver of any immunity nor could such statements constitute a waiver of immunity. Respondents' position that acknowledgment of the sovereign status of sister states results in sister states being authorized to exercise jurisdiction and legislate within the boundaries of other states is entirely erroneous. Indeed, the constitutional requirement of acknowledgment of the sovereign status of sister states does not enable any state to legislate for another state. The immunity of states from suit is not an immunity which arose through legislation but, as conceded by respondents, is an attribute of sovereignty inherent in the formation of states. Thus, states are not required to allow other states to legislate for the forum state's citizens but are simply required to acknowledge the status,

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including the immunities and privileges attaching thereto, which sister states enjoyed as independent nations at the time that the Union of states was formed.

Dated this 20th day of October, 1978.

Respectfully submitted,

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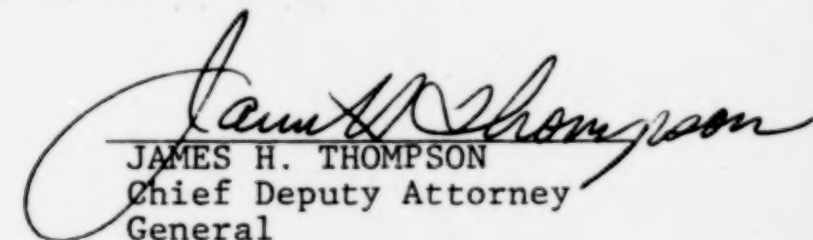
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CERTIFICATE OF SERVICE

I, JAMES H. THOMPSON, Chief Deputy Attorney General, hereby certify that on the 20th day of October, 1978, I mailed by first class mail, postage prepaid, three copies to each of the following:

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